No. 93-44

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In the Supreme Court of the United States

OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., ET AL.,
APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF THE FEDERAL RESPONDENTS TO AFFIRM

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QUESTION PRESENTED

Whether Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1471-1481, which require cable system operators to devote a portion of their channel capacity to the carriage of certain commercial broadcast stations and noncommercial educational broadcast stations, violate the First Amendment.

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Pursuant to this Court's Rule 18.6, the United States and the Federal Communications Commission move to affirm the judgment of the district court.

OPINION BELOW

The opinion of the district court (J.S. App. 1a-72a) is reported at 819 F. Supp. 32.

JURISDICTION

These consolidated cases were heard by a three-judge district court convened pursuant to Section 23 of the Cable Television Consumer Protection and Competition Act of 1992 (1992

Act), Pub. L. No. 102-385, 106 Stat. 1500; 47 U.S.C. 555(c)(1), [1] and 28 U.S.C. 2284. The judgment of the district court was entered on April 12, 1993. On May 3, 1993, notices of appeal were filed pursuant to Section 23 of the 1992 Act, 106 Stat. 1500; 47 U.S.C. 555(c)(2). The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

Congress enacted the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 4, 5, 106 Stat. 1471-1481; 47 U.S.C. 534, 535, to address certain anticompetitive practices in the cable industry that threaten the vitality of broadcast television and the availability of that medium to local viewers. As relevant here, the 1992 Act accomplishes that objective by requiring cable operators to devote a limited portion of their channel capacity to the carriage of certain commercial broadcast stations and noncommercial educational broadcast stations. The Act does so, moreover, in a manner that does not punish, suppress, or promote any particular programming based on its content. The so-called "must-carry" requirements, enacted pursuant to detailed congressional findings made after hearings spanning several years, therefore constitute a carefully designed mechanism specifically aimed at promoting the First Amendment interests of viewers—interests this Court has described as "paramount." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969). The district court therefore properly sustained the must-carry provisions in this case.

A. Statutory Background

1. Section 4 of the 1992 Act adopts a limited must-carry obligation relating to local commercial broadcast stations. In particular, a cable system with more than 300 subscribers but

[1] Unless otherwise specified, citations to the United States Code relating to the provisions of the 1992 Act refer to the place in Supp. IV 1992 where those provisions are to be codified.

12 or fewer active usable channels must carry "the signals of at least three local commercial television stations." § 4, 106 Stat. 1471; 47 U.S.C. 534(b)(1)(A). For systems with more than 300 subscribers and more than 12 active usable channels, a cable operator must devote up to one-third of its channel capacity to local commercial broadcast stations. § 4, 106 Stat. 1471; 47 U.S.C. 534(b)(1)(B).[2] In general, a cable operator must retransmit, in its entirety, the programming of a broadcast station carried to fulfill must-carry obligations. § 4, 106 Stat. 1471-1472; 47 U.S.C. 534(b)(3). And absent an agreement to the contrary, a commercial broadcast station must be carried in the channel position in which it is presently carried or was carried at specified times in the past. § 4, 106 Stat. 1472; 47 U.S.C. 534(b)(6). Finally, with some exceptions, a cable operator may not charge a fee for carrying broadcast signals in fulfillment of the must-carry provisions. § 4, 106 Stat. 1473; 47 U.S.C. 534(b)(10).[3]

For local noncommercial educational stations, Section 5 of the 1992 Act imposes similar requirements. Thus, a cable system with 12 or fewer channels must carry "one qualified local noncommercial educational television station." § 5, 106 Stat. 1478; 47 U.S.C. 535(b)(2)(A). A system having between 13 and 36 channels must carry between one and three such sta-

[2] If there are not enough full power local commercial broadcast stations to fill the requirements of the must-carry provisions, a cable operator with up to 35 active channels must carry one qualified low power station and an operator with more than 35 channels must carry two such stations. See § 4, 106 Stat. 1473-1474; 47 U.S.C. 534(c)(1); see also § 4, 106 Stat. 1476-1477; 47 U.S.C. 534(h)(2) (defining "qualified low power station").

[3] The 1992 Act provides that commercial broadcast stations may elect not to invoke the must-carry requirements, in which case they may withhold consent to retransmit their programming. See § 6(2), 106 Stat. 1482-1483; 47 U.S.C. 325(b)(1) and (3). If a broadcaster carries programming that is popular and attractive to a cable operator, there should be no reason to select the must-carry option, which is uncompensated. See J.S. App. 6a.

tions, and a system with more than 36 channels must carry "each qualified local noncommercial educational television station requesting carriage." § 5, 106 Stat. 1478; 47 U.S.C. 535(b)(3)(A) and (D). The 1992 Act requires a cable operator, in certain circumstances, to import distant signals (§ 5, 106 Stat. 1478; 47 U.S.C. 535(b)(3)(B)), but provides protection against substantial duplication of local noncommercial educational stations receiving carriage. § 5, 106 Stat. 1479; 47 U.S.C. 535(e). As with commercial stations, the 1992 Act requires cable operators to carry the entire programming schedule of noncommercial educational stations, specifies channel positioning requirements, and limits the payments allowable for the signals of noncommercial educational stations. See § 5, 106 Stat. 1479-1480; 47 U.S.C. 535(g) and (i).

2. The must-carry provisions in the 1992 Act were adopted after extensive public hearings, conducted over several years, that carefully examined the structure and operation of the cable industry. See S. Rep. No. 92, 102d Cong., 2d Sess. 3-4 (1992) (describing hearings); H.R. Rep. No. 628, 102d Cong., 2d Sess. 74 (1992) (same).[4] As part of the 1992 legislation, Congress enacted detailed factual findings supporting the must-carry requirements as a means of addressing the mar-

[4] See also, *e.g.*, *Cable TV Consumer Protection Act of 1991: Hearing on S. 12 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong., 1st Sess. (1991) [hereinafter *1991 Senate Cable Hearing*]; *Cable Television Regulation: Hearings on H.R. 1303 and H.R. 2546 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. (1991) [hereinafter *1991 House Cable Hearings*]; *Cable Television Regulation (Part 2): Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. (1990) [hereinafter *1990 House Cable Hearing (Part 2)*]; *Media Ownership—Diversity and Concentration: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. (1989) [hereinafter *Media Ownership Hearings*].

ket power and concentration of cable system operators and the anti-competitive practices existing in the cable television industry.

Congress found that "[f]or a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular * * * area, most cable television subscribers have no opportunity to select between competing cable systems." § 2(a)(2), 106 Stat. 1460. Congress also found that the cable industry has become "highly concentrated," resulting in greater "barriers to entry for new programmers and a reduction in the number of media voices available to consumers." § 2(a)(4), 106 Stat. 1460. And because of increasing vertical integration in the industry, cable operators have an incentive to favor affiliated programmers, making it "more difficult for noncable-affiliated programmers to secure carriage on cable systems." § 2(a)(5), 106 Stat. 1460-1461. At the same time, Congress found that more than 60% of all households with televisions have cable television, and that cable television "has become a dominant nationwide video medium." § 2(a)(3), 106 Stat. 1460.

Congress supplemented its findings on the structure of the cable industry with additional findings concerning the "substantial governmental and First Amendment interest" in promoting a diversity of programming. § 2(a)(6), 106 Stat. 1461. Congress found that there is a substantial governmental interest in assuring that cable subscribers have access to (a) local noncommercial educational programming; (b) local commercial broadcasting; and (c) local origination of programming, including news and public affairs programs critical to an informed electorate. §§ 2(a)(7)-(11), 106 Stat. 1461.

Those objectives, Congress determined, have been threatened by the competition between cable operators and broadcasters for advertising revenues. Because cable systems and broadcasters compete for advertising, cable systems have an incentive to drop local broadcasters or relegate them to unfa-

vorable channel positions—steps that threaten the economic base and survival of television broadcasting. §§ 2(a)(14)-(16), 106 Stat. 1462. Further, Congress found that "[m]ost subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, or cannot otherwise receive broadcast television services." § 2(a)(17), 106 Stat. 1462. Finally, Congress determined that cable systems derive great benefits from their ability to carry popular broadcast programming, which has resulted in an "effective subsidy" of cable systems by local broadcasters. § 2(a)(19), 106 Stat. 1462.

In light of those findings, Congress declared that it is the policy of the 1992 Act, *inter alia*, to promote a diversity of views and information for the public and assure that cable operators do not exercise undue market power. §§ 2(b)(1) and (5), 106 Stat. 1463.

B. The Proceedings In This Case

1. Soon after the 1992 Act was enacted, appellants filed these five consolidated actions challenging the constitutionality of the must-carry requirements. Their must-carry claims were heard by a three-judge district court convened under 28 U.S.C. 2284. See 1992 Act, § 23, 106 Stat. 1500; 47 U.S.C. 555(c)(1). On April 12, 1993, a divided court ruled that the must-carry provisions of the 1992 Act comply with First Amendment requirements.

a. The district court began its analysis by observing that Congress had found (1) that horizontal concentration and vertical integration of companies in the cable industry created barriers to access to cable facilities by noncable programmers; (2) that cable systems serve 60% of all households with televisions; (3) that in cable households, cable has virtually supplanted over-the-air reception; (4) that competition between cable systems and broadcasters for advertising has placed free broadcast television in jeopardy; and (5) that must-

carry provisions are needed to preserve local broadcasting for those viewers who receive cable, as well as for those who do not. J.S. App. 10a-12a.

The court found that in enacting the must-carry provisions, Congress was merely seeking "to impose order upon a market in dysfunction." J.S. App. 12a. In the court's view, the 1992 Act "is simply industry-specific antitrust and fair trade practice regulatory legislation." *Id.* at 13a. And the must-carry requirements "are essentially economic regulation designed to create competitive balance in the video industry as a whole, and to redress the effects of cable operators' anti-competitive practices." *Ibid.*

The court rejected appellants' contention that the must-carry obligations are subject to strict scrutiny under this Court's cases condemning compelled speech or interference with editorial discretion. See J.S. App. 16a-19a. Those decisions, the court reasoned, call for strict scrutiny only if "it appears that the government has prescribed the content—either the message or the subject matter—of the speech to be spoken." *Id.* at 16a. Thus, finding that the aim of the must-carry provisions was "to restore competitive balance and assure a functional market in the distribution of video signals, whatever might be said with those signals," the court concluded that the rules do not prescribe the content of speech. *Id.* at 19a.[5]

The court found unpersuasive appellants' contention that the 1992 Act's policy—to "promote the availability to the pub-

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[5] As the court explained (J.S. App. 15a-16a):

> All parties agree * * * that the must-carry provisions are not *viewpoint*-based; must-carry rights are conferred upon all full-power local broadcasters, and the obligations upon most cable operators, regardless of any views expressed in the programming of either. The provisions do not compel the carriage of any particular messages nor do they impose any burden on operators or programmers on the basis of the messages they or the broadcasters propose to transmit.

lic of a diversity of views and information through cable television and other video distribution media" (§ 2(b)(1), 106 Stat. 1463)—is indicative of a content-based statute. J.S. App. 19a & n.23. The court acknowledged that "Congress may have presumed, on a very nonspecific (and unarticulated) level, that there would be some content differences between the subject matter and/or emphasis of the video signals emitted by local broadcasters and those produced by cable programmers." *Id.* at 20a. But the court found that any content-relatedness was no more than "marginal[] * * * to the point of [being] *de minimis*." *Ibid.*

The court then sustained the must-carry provisions under the intermediate level of scrutiny prescribed by *United States* v. *O'Brien*, 391 U.S. 367 (1968), and *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989). First, the court concluded that the must-carry provisions further the significant governmental interest of "promot[ing] fair competition among video 'speakers' in order to assure the survival of local broadcasting for the benefit of both those who subscribe to a cable service and for those who do not." J.S. App. 23a; see *id.* at 23a-26a. Second, in ruling that the must-carry provisions are narrowly tailored to serve that interest, the court emphasized Congress's finding that input-selector switches are not an effective means of preserving local broadcasting and that the must-carry requirements do not unnecessarily burden appellants' freedom of speech. *Id.* at 26a-28a.[6]

b. Judge Williams dissented. He recognized that Congress confronted the "very real problem" that "cable systems control access 'bottlenecks' to an important communications medium" (J.S. App. 50a), but he concluded that Congress may

[6] Judge Sporkin filed a concurring opinion to emphasize that "any burden imposed by the 1992 Cable Act on speech is * * * remote and incidental to the purpose and effect of the 1992 Cable Act." J.S. App. 36a. In his view, Congress acted permissibly to "rei[n] in cable companies' growing economic might and to restore competitive balance in the telecommunications industry." *Ibid.*

not extend access only to local commercial and noncommercial stations. *Id.* at 51a-52a. Applying strict scrutiny (*id.* at 53a-57a), Judge Williams reasoned that there was an insufficiently close fit between the important governmental objective of promoting programming diversity and the must-carry requirements. *Id.* at 57a-58a. In particular, he noted that cable systems now carry a majority of local stations and that the interest in diverse programming may be served by an access requirement available to all unaffiliated programmers. *Id.* at 58a-60a. He also suggested that there was insufficient evidence to support Congress's determination that over-the-air broadcasting is in jeopardy and in need of the protection of the must-carry provisions. *Id.* at 60a-67a. And even if it were, Judge Williams would require Congress to adopt alternatives such as mandatory leased access or federal subsidization of broadcasting. *Id.* at 66a. Finally, Judge Williams rejected the argument that the must-carry rules are justified by the fact that government regulation has done much to promote cable's position, and that the must-carry rules are a permissible means of assuring that cable operators do not use their market power to drown out the voices of others. *Id.* at 69a-71a.

2. On April 14, 1993, the district court denied appellants' request for an injunction pending appeal. 4/14/93 Dist. Ct. Order 1-2. Judge Williams would have granted the injunction. *Id.* at 2. On April 29, 1993, the Chief Justice denied appellants' application to enjoin the enforcement of Sections 4 and 5 during the pendency of this appeal. *Turner Broadcasting System, Inc.* v. *FCC*, 113 S. Ct. 1806 (1993) (Rehnquist, C.J., in chambers).[7]

[7] Subsequent to that order, Viacom International, Inc. (Viacom), filed a separate lawsuit challenging the constitutionality of the must-carry provisions in the United States District Court for the Northern District of California. On June 1, 1993, a single judge issued a temporary restraining order barring enforcement of the 1992 Act against Viacom pending a hearing on its motion for a

ARGUMENT

1. Appellants argue (J.S. 13-24) that because the cable operators are speakers for purposes of the First Amendment, the district court erred in refusing to apply strict scrutiny to a statute that seeks to affect the programming carried by cable operators. The must-carry provisions, however, are valid under a straightforward application of this Court's cases recognizing that when market failure threatens to drown out the speech of some, Congress may take reasonably limited and viewpoint-neutral measures to protect the "paramount" First Amendment interests of viewers (*Red Lion*, 395 U.S. at 390) by ensuring that a diversity of programming and information will be available.

a. The proper framework for evaluating the First Amendment issues in this case is found in *Associated Press* v. *United States*, 326 U.S. 1 (1945). There, this Court rejected a First Amendment challenge to the application of the Sherman Act to a news gathering organization. Although the judgment in *Associated Press* required the organization to deal with certain newspapers that it would otherwise have excluded from its membership, this Court held that the resulting obligation to speak was permissible under the circumstances:

> [The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. * * * Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from

preliminary injunction. See 28 U.S.C. 2284(b)(3). On June 29, 1993, a three-judge court dissolved the temporary restraining order. The court later issued an opinion explaining that Viacom's suit was barred under principles of res judicata because Viacom was in privity with a party to this suit. See *Viacom International, Inc.* v. *FCC*, No. C-93-1984 EFL (Aug. 26, 1993), slip op. 7-20.

> publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.

Id. at 20; see *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 155 (1951) (sustaining injunction against newspaper's refusal to accept advertisements from merchants who advertised on the local radio station; the decree imposed "no restriction upon any guaranteed freedom of the press").[8]

Significantly, the reasoning of *Associated Press*—that First Amendment interests are served when the government takes reasonable steps to correct market failure in a market whose commodity is speech—has been applied to regulation of radio and television broadcasting, an area closely related to the cable industry. For more than half a century, Congress and the FCC have regulated broadcasting "so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service." 47 U.S.C. 151 (1988). To that end, Congress has charged the FCC, *inter alia*, with encouraging "the larger and more effective use of radio in the public

[8] Appellants attempt to distinguish (J.S. 14-15) *Associated Press* on the ground that it arose under the Sherman Act, a statute of general applicability. To be sure, that consideration was part of the rationale of both *Associated Press* and *Lorain Journal*. But it was not, and could not have been, the entire rationale of those cases. Neither case involved a facial attack on the application of the antitrust laws to the media. Rather, each case involved an as-applied challenge to a particular decree enforcing the Sherman Act in a way that directly altered the defendant speaker's communicative activity. The judgment in *Associated Press* ordered the news organization to share its collective information (*i.e.*, to speak) with some entities with which it otherwise would not do business, and the injunction in *Lorain Journal* required a newspaper to carry advertisements that it would not otherwise have carried.

interest" (47 U.S.C. 303(g) (1988)) and with awarding broadcast licenses so that the "public convenience, interest, or necessity" will be served and "a fair, efficient, and equitable distribution of radio service" will be provided to all the Nation's communities. 47 U.S.C. 307(a) and (b) (1988).

In numerous cases, this Court has sustained against First Amendment challenge the FCC's reasonably limited and viewpoint-neutral implementation of that authority to correct market failure that interfered with the wide dissemination of programming and information to listeners and viewers, even when the resulting rules were designed to affect the content of programming carried by broadcasters. See, *e.g.*, *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 198-201, 226-227 (1943) (*NBC*) (sustaining FCC rules that, *inter alia*, prohibited networks from entering contracts forbidding a network affiliate from carrying programs of another network and forbidding a network from selling its programs to another station in the affiliate's territory); *Red Lion*, 395 U.S. at 392-401 (sustaining the FCC's personal attack rule and the fairness doctrine as applied to broadcasters); *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775, 801 (1978) (FCC may prohibit co-ownership of a newspaper and broadcast station located in a single community; the "purpose and effect [of the regulations] is to promote free speech, not to restrict it"); *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 567 (1990) (sustaining minority preferences in licensing and distress sales; "the interest in enhancing broadcast diversity is, at the very least, an important governmental objective"); see also *CBS, Inc.* v. *FCC*, 453 U.S. 367, 396 (1981) (upholding law requiring "reasonable access" to broadcast time for federal electoral candidates; statute makes "significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process").

As the Court explained in those cases, the free market does not function properly in the context of broadcasting because

the radio spectrum is not large enough to accommodate everyone wishing to broadcast. Consequently, broadcast regulation, including the licensing of broadcasters, has been "as vital to its development as traffic control was to the development of the automobile." *NBC*, 319 U.S. at 213. Congress and the FCC may not use that regulatory authority to favor speakers "upon the basis of their political, economic or social views" (*id.* at 226); to silence, discriminate against, censor, or promote particular viewpoints (*Red Lion*, 395 U.S. at 396); or to adopt requirements that are not "limited" and "reasonable" in scope (*CBS*, 453 U.S. at 396 (emphasis omitted)). But within those boundaries, this Court has found considerable latitude for federal regulation designed to promote a broad diversity of programming and information, recognizing that such regulation directly serves "the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Red Lion*, 395 U.S. at 390.

b. Although the cable industry is not characterized by the same kind of physical scarcity as broadcasting, salient features of that industry nevertheless similarly justify governmental regulation to correct market failure and promote diversity of programming and information.

First, Congress accurately determined that various circumstances, "including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area," have given rise to natural monopoly characteristics resulting in a similar bottleneck in communications. 1992 Act, § 2(a)(2), 106 Stat. 1460; see J.S. App. 13a ("The regulation is justified by the existing structure of the cable business itself, and by the market peculiarities resulting from the technological differences in the manner in which different video signal distributors deliver their products to their viewers' receivers."); cf.

FCC v. *Beach Communications, Inc.*, 113 S. Ct. 2096, 2104 (1993) (because of the fixed costs incurred in installing the receiving antenna and the associated transmission equipment, first cable operator in a market will enjoy substantial cost advantages in providing service to additional, unserved subscribers).[9]

Congress also found that (1) cable companies serve more than 60% of American households with televisions;[10] (2) the cable industry is highly concentrated;[11] and (3) the industry is vertically integrated and its members have a powerful incentive to favor affiliated cable programmers over unaffiliated broadcasters.[12] §§ 2(a)(3)-(5), 106 Stat. 1460-1461. In

[9] See, *e.g.*, *Media Ownership Hearings* 685 (statement of Edward O. Fritts, President, National Association of Broadcasters (NAB)) (20 multiple system operators (MSOs) serve 70% of subscribers; fewer than 1% face competition).

[10] See *1991 House Cable Hearings* 755 (statement of NAB) (93% of American homes are passed by cable, and more than 60% subscribe to cable); *1991 Senate Cable Hearing* 118 (statement of James P. Mooney, President, National Cable Television Association) (60% of homes have cable).

[11] See, *e.g.*, *Media Ownership Hearings* 343 (statement of Bob Phillips, National Rural Telecommunications Cooperative) (noting that the 25 biggest MSOs serve 72% of the 49.5 million cable subscribers); *id.* at 97 (statement of Michael A. Salinger, Columbia University) (one company owns 82% of second largest MSO and owns first and third largest pay services); *id.* at 85 (statement of Ben H. Bagdikian, University of California at Berkeley) (three cable firms serve one-third of all subscribers).

[12] See, *e.g.*, *Media Ownership Hearings* 99 (statement of Michael A. Salinger, Columbia University) (describing research showing that "vertically integrated systems give preference to the services they own and tend to exclude competing services"); *1991 Senate Cable Hearing* 214 (statement of James Hedlund, President, Association of Independent Television Stations, Inc. (AITS)) (same); see also *Media Ownership Hearings* 29, 31-32, 41 (statement of John C. Malone, President, Telecommunications, Inc.) (describing holdings of cable companies in cable programmers).

addition, cable companies compete with broadcasters for advertising revenues,[13] giving the cable operators a strong economic incentive to drop the broadcasters' signals or reposition them unfavorably.[14] §§ 2(a)(14)-(15), 106 Stat. 1462. Finally, the concerns relating to that potential unfair competition cannot be addressed effectively through technology allowing subscribers to switch between cable transmissions and over-the-air broadcasting.[15] §§ 2(a)(16)-(17), 106 Stat. 1462. The must-carry requirements therefore directly address economic market dysfunction by ensuring that cable operators do not use their market power to engage in unfair competition to the detriment of viewers who depend upon or wish to receive full-service local broadcasting.

Second, governmental conduct has substantially contributed to the market power of cable. Because cable systems traditionally have used public rights-of-way (see *Leathers* v. *Medlock*, 111 S. Ct. 1438, 1441 n.1 (1991); *Beach Communications*, 113 S. Ct. at 2100), and because the federal government

[13] See, *e.g.*, *1990 House Cable Hearing (Part 2)* 103 (statement of NAB) (advertising on cable rose from $58 million in 1980 to approximately $2 billion in 1989); *1991 Senate Cable Hearing* 351-352 (statement of Association of National Advertisers, Inc.) (must-carry requirements "are essential to ensure that cable systems do not misuse their 'gate-keeper' position to exclude or financially penalize broadcast competitors"); *1991 House Cable Hearings* 755 (statement of NAB) (cable sold $963 million in advertising in 1987; in 1991 estimated cable advertising revenues were between $2 and $3 billion; and revenues are estimated to reach $9 or $10 billion by the end of the decade).

[14] See, *e.g.*, *1991 Senate Cable Hearing* 214-215 (statement of James Hedlund, President, AITS) (discussing incentive of cable companies to drop broadcasters and reduce competition for viewers and advertising revenues).

[15] See, *e.g.*, *1991 Senate Cable Hearing* 246 n.86 (statement of James Hedlund, President, AITS) ("both the broadcasting and cable industries agreed that the A/B switch was not a viable solution to the problem" of cable access).

has required cable systems to obtain state or local franchises (see 47 U.S.C. 541(b) (1988)), cable operators have been unable to provide service without obtaining authority from a state or local governmental authority. Until the 1992 Act prohibited franchise authorities from doing so (§ 7(a), 106 Stat. 1483; 47 U.S.C. 541(a)(1)), most local authorities made exclusive franchises available to cable operators. See J. Goodale, *All About Cable* § 4.02[1], at 4-7 to 4-8 (1991) (discussing prevalence of exclusive cable franchises); 47 U.S.C. 541(a)(1) (1988) (authorizing franchise authorities to determine the number of cable operators in its jurisdiction).

In addition, in the Cable Communications Policy Act of 1984 (1984 Act), Pub. L. No. 98-549, 98 Stat. 2779, Congress sharply limited franchise fees (47 U.S.C. 542 (1988)); restricted rate regulation (47 U.S.C. 543 (1988)); and substantially limited franchise authorities' ability not to renew franchises, while also requiring compensation when franchises were not renewed (47 U.S.C. 546 and 547 (1988)).[16] Finally, Congress provided substantial benefits to cable operators by enacting the Copyright Act of 1976, 17 U.S.C. 111, which adopted a system of compulsory licensing for the retransmission of broadcast programming by cable operators.

As this Court has made clear, where government regulation has given certain speakers "a preferred position" in the marketplace of ideas and enables them to monopolize an important means of communication, the government may act to ensure that such speakers provide a diversity of programming to their listeners and viewers. See *Red Lion*, 395 U.S. at 400; cf. *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652, 659-660 (1990) (because "state-conferred corporate structure * * * facilitates the amassing of large treasuries," the State has a compelling state interest in ensuring that corporations do not use the resources to obtain an "unfair advantage in the political marketplace"). Even where changed circumstances create a "present possibility for new entry by competing" entities, that possibility is "not enough, in itself, to render unconstitutional the Government's effort" to assure a wide availability of programming and information in the public interest. *Red Lion*, 395 U.S. at 400.

[16] The 1992 Act imposes significant rate regulation on cable operators that are not subject to effective competition. § 3(a), 106 Stat. 1464-1471; 47 U.S.C. 543.

Third, this Court's cable television precedents have recognized that cable and broadcast television are integrally related, and that the objectives of broadcast regulation adopted by Congress and the FCC and approved by this Court could not be accomplished if the cable industry may not be regulated to advance the purposes of such regulation. Prior to 1984, the Commission lacked explicit authority to regulate cable. But it adopted cable regulations—including a must-carry rule—pursuant to its authority under the Communications Act of 1934, 47 U.S.C. 151 *et seq.* See *First Report & Order in Docket Nos. 14895 & 15233*, 38 F.C.C. 683, 697, 741-742 (1965); see also 47 U.S.C. 151, 303(b) and (g) (1988).[17]

[17] The original must-carry rules remained in effect until 1985, when the D.C. Circuit invalidated them on First Amendment grounds in *Quincy Cable TV, Inc.* v. *FCC*, 768 F.2d 1434 (1985), cert. denied, 476 U.S. 1169 (1986); see also *Century Communications Corp.* v. *FCC*, 835 F.2d 292 (D.C. Cir. 1987) (invalidating interim must-carry rules promulgated in the aftermath of *Quincy Cable*), cert. denied, 486 U.S. 1032 (1988). Those decisions, however, do not speak to the validity of the must-carry provisions of the 1992 Act. In each case, the court of appeals relied heavily on the absence of a sufficient record to support the FCC's rationale for the must-carry rules—that an unregulated cable industry posed a serious threat to local broadcasting. See *Century Communications*, 835 F.2d at 304; *Quincy Cable*, 768 F.2d at 1455-1459. Because the must-carry provisions enacted in the 1992 Act are supported by an extensive legislative record, reduced to congressional findings of fact, the reasoning of *Quincy Cable* and *Century Communications* would suggest a contrary result here.

In *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), this Court sustained the FCC's exercise of authority over cable—including its authority to promulgate must-carry rules. In so doing, the Court emphasized that "Congress has imposed upon the Commission the 'obligation of providing a widely dispersed radio and television service,' with a 'fair, efficient, and equitable distribution' of service among the 'several States and communities.'" *Id.* at 173-174 (footnote omitted). The Court also noted that Congress and the FCC had concluded that "these obligations require for their satisfaction the creation of a system of local broadcasting stations, such that 'all communities of appreciable size [will] have at least one television station as an outlet for local self-expression.'" *Id.* at 174. Relying on the Commission's reasonable determination that the importation of distant signals by cable operators threatened to divide the "available audiences and revenues" and to "deprive the public of the various benefits of a system of local broadcasting stations," the Court found that the FCC could not discharge its responsibilities regarding broadcasting without also asserting authority over cable. *Id.* at 174-176; see also *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972) (upholding FCC's authority to promulgate regulation requiring cable systems with 3,500 or more subscribers to originate local programs to ensure diversified programming).[18]

Congress's findings accompanying the 1992 Act indicate that the must-carry provisions rest on the same rationale as

[18] See, *e.g.*, *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 697 (1979) ("'successful performance' of [the FCC's] duty to ensure 'the orderly development of an appropriate system of local television broadcasting' depended on regulation of cable operations"); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 714 (1984) ("There can be little doubt that the comprehensive regulations developed over the past 20 years by the FCC to govern signal carriage by cable television systems reflect an important and substantial federal interest.").

the cable regulations upheld against statutory challenge in *Southwestern Cable* and *United States* v. *Midwest Video Corp.* As Congress specifically found, enactment of the must-carry requirements was necessary not only to preserve "the economic viability of free local broadcast television," but also to ensure that broadcasters retain their "ability to originate quality local programming." § 2(a)(16), 106 Stat. 1462. Even where market dysfunction in the cable industry does not jeopardize the existence of local broadcasting altogether, it nevertheless threatens to weaken the local broadcasters' ability to provide full-service programming to local communities. See H.R. Rep. No. 628, *supra*, at 51-52, 64; S. Rep. No. 92, *supra*, at 59. At the same time, broadcasters' programming "remains the most popular programming [carried] on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of [broadcasters'] signals." § 2(a)(19), 106 Stat. 1462. Accordingly, as the Court recognized in *Southwestern Cable* and *United States* v. *Midwest Video Corp.*, because of the similarity and interrelatedness of cable and broadcast television, a comparable regulatory approach is appropriate for each. *United States* v. *Midwest Video Corp.*, 406 U.S. at 669 (plurality opinion) (cable regulation seeking to assure that "viewers are provided suitably diversified programming" has "the same objective underlying [the broadcast] regulations sustained in *National Broadcasting Co.* v. *United States*, *supra*").

Under the applicable standards, the must-carry provisions of the 1992 Act easily pass muster. As discussed, those provisions require cable operators to set aside only a limited portion of their channel capacity for local broadcasting. Moreover, "must-carry rights are conferred upon all full-power local broadcasters, and the obligations upon most cable operators, regardless of any views expressed in the programming of either." J.S. App. 15a-16a. Particularly when measured against broadcast regulations sustained by this Court—including the explicitly content-related fairness doctrine (*Red*

Lion)[19] and right of reasonable access for federal political candidates (*CBS*)—the reasonably limited and viewpoint-neutral must-carry provisions of the 1992 Act plainly constitute a permissible effort to promote the viewers' paramount First Amendment interest in a wide diversity of programming and information. Indeed, they are far more limited than the must-carry rules this Court found reasonably ancillary to the legitimate objectives of broadcast regulation in *Southwestern Cable*. See 392 U.S. at 166 (under must-carry rules then in effect, cable systems were required "to transmit to their subscribers the signals of any station into whose service area they * * * brought competing signals," and were forbidden "to duplicate the programming of such local stations for * * * 15 days before and after a local broadcast").

c. Appellants contend (J.S. 22-23) that because the cable industry is not characterized by spectrum scarcity, cable regulation cannot be evaluated under standards comparable to those governing broadcasting regulation. For two reasons, that contention is unpersuasive.

First, as is the case with broadcasting, part of the bottleneck in the cable industry is attributable to the physical characteristics of cable itself. Although cable is not characterized by spectrum scarcity, it "involves another type of interference—interference with other users of telephone poles and underground ducts." *Omega Satellite Products Co.* v. *City of*

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[19] The "fairness doctrine" required broadcasters "to provide adequate coverage of public issues and to ensure that this coverage fairly and accurately reflects the opposing views." *FCC* v. *League of Women Voters*, 468 U.S. 364, 378 (1984). That doctrine, which the FCC has since eliminated (see *Syracuse Peace Council* v. *FCC*, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990)), intruded far more upon programming discretion than a requirement that cable operators devote a limited portion of their channel capacity to local broadcasting, without regard to the programming of the broadcasters to be carried or that which the cable operator would otherwise place on the channels set aside.

Indianapolis, 694 F.2d 119, 127 (7th Cir. 1982) (Posner, J.). Cable operators typically (although not invariably) transmit their signals "through cables strung over utility poles and through underground conduits." *Leathers*, 111 S. Ct. at 1441 n.1; see *Beach Communications*, 113 S. Ct. at 2100 (a traditional cable system "delivers video programming to a large community of subscribers through coaxial cables laid under city streets or along utility lines"). The practical difficulty and expense of constructing a competing cable system can therefore be very great, particularly in urban areas. See, *e.g.*, J. Goodale, *supra*, § 4.02[1], at 4-7; Brenner, *Cable Television and the Freedom of Expression*, 1988 Duke L.J. 329, 332. Thus, there is typically some physical constraint on the development of multiple competing cable systems, and a concomitant need for the government to exert a form of "traffic control" where traditional cable systems are concerned. *NBC*, 319 U.S. at 213.

Second, the concept of physical scarcity is not essential to invoke the framework applicable here. To be sure, the concept of spectrum scarcity played a significant role in the development of this Court's rationale for sustaining broadcast regulation. But the critical factor has not been the physical phenomenon of spectrum scarcity as such, but the resulting inability of the broadcasting market to function successfully. We see no reason to exclude from the Court's approach cases in which comparable market dysfunction occurs for other reasons. To limit the Court's approach to the physical spectrum, moreover, would be contrary to this Court's precedents.

For example, in articulating the First Amendment justification for the broadcast regulation at issue in *Red Lion*, the Court relied heavily on its precedents in *Associated Press* as well as other newspaper cases having nothing to do with the scarcity of the electromagnetic spectrum, but with economically driven market failure. See *Red Lion*, 395 U.S. at 387, 390. The Court in *Red Lion* also made clear that its analysis applied even where factors other than spectrum scarcity gave

some broadcasters the ability to monopolize the market for programming and information:

> Even where there are gaps in spectrum utilization, the fact remains that existing broadcasters have often attained their present position because of their initial government selection in competition with others before new technological advances opened new opportunities for further uses. Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by the Government. Some present possibility for new entry by competing stations is not enough, in itself, to render unconstitutional the Government's effort to assure that a broadcaster's programming ranges widely enough to serve the public interest.

Red Lion, 395 U.S. at 400.

In short, the power of private entities to silence others' speech justifies government intervention to promote a diversity of programming and information, whether that market power derives from physical limitations on the medium of delivery (as in *Red Lion*); from economic monopoly (as in *Associated Press*); from advantages secured through governmental action (as in *Red Lion* and *Austin*); or from a combination of the three (as in this case). Where Congress acts to address such market failure in a reasonably limited and viewpoint-neutral way designed to provide viewers the widest dissemination of programming and information, this Court's cases instruct that First Amendment interests are served, not offended, by such legislation.

2. Even if the foregoing framework were not applicable to this case, the district court's judgment should be affirmed under the framework of intermediate scrutiny established in

United States v. *O'Brien*, 391 U.S. 367 (1968). Although the must-carry provisions, like any law designed to promote diversity of information, alter the content of programming, they are content-neutral in the crucial constitutional sense. "The principal inquiry in determining content neutrality * * * is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). However, "the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic." *Burson* v. *Freeman*, 112 S. Ct. 1846, 1850 (1992).

When measured against the standards articulated by this Court, the must-carry provisions are not content-related for First Amendment purposes. As the district court explained, the must-carry provisions "do not compel the carriage of any particular messages nor do they impose any burden on operators or programmers on the basis of the messages they or the broadcasters propose to transmit." J.S. App. 16a. The provisions thus are not designed to express disagreement with the message of cable operators or programmers. Nor do the must-carry provisions single out any topic that cable operators may or may not discuss. Compare, *e.g.*, *Simon & Schuster, Inc.* v. *Members of the New York State Crime Victims Bd.*, 112 S. Ct. 501, 508 (1991) (speech about crime); *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 537 (1980) (prohibition against discussion of nuclear power).[20]

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[20] Appellants argue (J.S. 20-21) that the 1992 Act's "preference for local broadcasters" renders the Act impermissibly content-based. The 1992 Act, however, confers must-carry rights upon all full power local broadcasters regardless of the programming they carry. Accordingly, this case differs significantly from *City of Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505, 1517 (1993), in which this Court invalidated a municipal ordinance selectively banning commercial publications from the city's newsracks based

The must-carry provisions satisfy the requirements of the *O'Brien* test. First, there is an "important or substantial governmental interest" (*O'Brien*, 391 U.S. at 377) in addressing unfair competition in the video communications market and in preserving the local broadcast industry. As Congress found in the 1992 Act, the local broadcast industry provides "educational and informational programming to the Nation's citizens, thereby advancing the Government's compelling interest in educating its citizens," and serves as an "important source of local news and public affairs programming and other local broadcast services critical to an informed electorate." §§ 2(a)(8)(A) and (11), 106 Stat. 1461; see H.R. Rep. No. 628, *supra*, at 50; see also *CBS*, 453 U.S. at 396 (citing cases). As discussed, moreover, if Congress lacked authority to regulate cable it would effectively lose its ability to assure "a fair, efficient, and equitable distribution" (47 U.S.C. 307(b) (1988)) of broadcasting services, a feature of broadcast regulation for more than half a century. See S. Rep. No. 92, *supra*, at 58. Accordingly, "an important and substantial federal interest" is served by a regulatory scheme that, like the must-carry provisions, "strike[s] a balance between protecting noncable households from loss of regular television broadcasting service due to competition from cable systems and ensuring that the substantial benefits provided by cable of increased and diversified programming are secured for the maximum number of viewers." *Capital Cities Cable*, 467 U.S. at 714.

Second, the must-carry requirements are narrowly tailored, as required by *O'Brien*, 391 U.S. at 377, because they are not "substantially broader than necessary" to achieve legitimate governmental ends. *Ward*, 491 U.S. at 800. As

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on "the city's naked assertion that commercial speech has 'low value.'" The must-carry provisions are not designed to suppress any kind of speech, but to promote diversity of information by addressing market dysfunction and anti-competitive practices in the cable industry.

Congress found after lengthy hearings on the cable industry, the deployment of technology to allow viewers to switch between cable and over-the-air television is not a viable alternative. § 2(a)(17), 106 Stat. 1462. And as the legislative history notes, the must-carry obligations themselves are carefully confined: a cable operator is required to devote only one-third of its channel capacity to local commercial programming; an operator has discretion to choose which broadcasters it will carry when there are more local broadcasters than the operator must carry; there is nonduplication protection; and the requirements are designed to protect those broadcasters most likely to be in direct competition with cable operators. S. Rep. No. 92, *supra*, at 61. Even if it may be possible to envision an alternative scheme that may have less impact on the cable operators (see J.S. App. 50a-51a (Williams, J., dissenting)), this Court's cases make clear that narrow tailoring does not require the adoption of the least restrictive or intrusive alternative.[21] See *Ward*, 491 U.S. at 798.

3. Appellants contend (J.S. 16-17) that the must-carry provisions constitute a form of forced speech that interferes with the cable operators' editorial discretion and places a concomitant burden on the right of cable programmers to speak. Those contentions, however, are unsupported by this Court's cases.

Appellants rely heavily (J.S. 17) on this Court's decision in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). There, the Court invalidated a state law giving political candidates a right to equal space in a newspaper to reply to attacks on their records by the newspaper. For several reasons, however, *Tornillo* does not govern here. First, as discussed, for purposes of First Amendment analysis, cable shares many similarities with broadcast television, and the constitutional

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[21] We note, moreover, that alternatives suggested in the dissenting opinion below, such as public subsidization, could be regarded by Congress as having very serious disadvantages.

analysis of *Red Lion* rather than *Tornillo* supplies the relevant framework here. Second, the state statute at issue in *Tornillo* represented a very serious incursion into the editorial discretion of newspapers. The reply statute was strongly viewpoint-based and struck at the core of First Amendment speech—political discourse. When a newspaper expressed an opinion critical of a political candidate, it was compelled by state law to print the opposite viewpoint as well. As the Court explained, the statute "exact[ed] a penalty on the basis of the content of a newspaper." 418 U.S. at 256. That is a far cry from a statute, such as the 1992 Act, that is designed to serve the public's First Amendment interest in diversity without an intent to punish, suppress, or promote the message being conveyed by the broadcaster, the cable operator, or the cable programmer.[22]

Third, although cable operators exercise "editorial discretion over which stations or programs" to carry (*City of Los*

[22] Appellants emphasize (J.S. 17) *Tornillo*'s statement that the government may not compel publishers to print that which reason tells them should not be published. 418 U.S. at 254 (citing *Associated Press*, 326 U.S. at 20 n.18). *Tornillo*'s observation, however, does not undermine the constitutionality of the 1992 Act. First, where a law is specifically designed to require a publisher to print a reply to a view it has taken, the very essence of the law is to compel that publisher to print what reason tells him not to print. The must-carry rules have no such purpose, but are designed to assure that cable operators do not exercise their market power to silence other speakers and thereby to deprive viewers of competing services. Second, while the decree in *Associated Press* did not compel members of the Associated Press (AP) to print that which reason told them not to print, it effectively required AP to supply information (*i.e.*, to speak) to certain newspapers with whom it otherwise would not have dealt for economic reasons. And, in *Lorain Journal*, a newspaper was enjoined from refusing to deal with a category of advertisers. Thus, the must-carry provisions, which are viewpoint-neutral requirements designed to combat anticompetitive practices directed at broadcasters, are constitutional under *Tornillo*, *Associated Press*, and *Lorain Journal*.

Angeles v. *Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986)), their functions are quite distinct when they serve as passive conduits retransmitting the programming of others, rather than originating programming of their own. Cf. *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, 415 U.S. 394, 404-405 (1974). If national newspapers monopolized the local distribution systems in a city (*i.e.*, owned all the newsstands and newsracks), and the city passed an ordinance requiring such newspapers to make a limited percentage of space on their newsstands available to local newspapers (without regard to content), the effect on the newspapers' "editorial discretion" would be far less intrusive than that of a law requiring them to print replies to their editorials. And it would be analogous to the intrusion on cable operators resulting from the must-carry provisions. The concerns underlying *Tornillo* thus do not apply to the must-carry provisions at issue here.[23]

[23] Nor are the appellants assisted by the other "compelled-speech" cases on which they rely. See J.S. 16-17, 19. The must-carry provisions can hardly be equated with the viewpoint-based requirement in *Pacific Gas & Elec. Co.* v. *Public Utilities Comm'n*, 475 U.S. 1, 13 (1986) (plurality opinion), that a utility include in its mailings materials submitted by those who disagree with the views expressed in the utility's own newsletter. Nor is Congress's reasonable accommodation of the First Amendment interests of viewers, broadcasters, and cable operators inconsistent with the principle that a charity cannot be required to disclose facts that might interfere with its ability to obtain political donations, when the disclosure is unnecessary to protect the potential donor's interests. See *Riley* v. *National Fed'n of Blind, Inc.*, 487 U.S. 781, 795-800 (1988).

Finally, appellants err in relying (J.S. 19) on *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam). *Buckley* struck down statutory limitations on political expenditures, noting that the right of some to speak may not be secured by suppressing the rights of others. Unlike this case, however, *Buckley* involved no danger that unfair economic competition would deprive viewers of local broadcast services. Moreover, the Court in *Buckley* explicitly distinguished

Instead, this case is more closely analogous to *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 87-88 (1980), which upheld a state law mandating public access to shopping centers for speech-related activities. First, the views expressed by broadcasters are not likely to be associated with the cable company that carries broadcasting stations among many other channels. Second, the government is not dictating that a cable operator convey any particular message. Third, a cable company may insert appropriate disclaimers of responsibility for material broadcast pursuant to the must-carry requirements. Thus, there is no risk that viewers will believe that cable operators are "affirm[ing] their belief" in a position or view carried pursuant to the must-carry provisions of the 1992 Act. *PruneYard*, 447 U.S. at 88.

4. Appellants contend (J.S. 24-26) that the district court gave unwarranted deference to Congress's findings supporting the 1992 Act. Appellants do not dispute Congress's findings that the cable industry is highly vertically integrated and is characterized by substantial horizontal concentration. Rather, they dispute (J.S. 25-26) Congress's finding that, in the absence of the must-carry provisions, cable operators would deny carriage to a significant number of broadcast stations.

Appellants do not take issue with the underlying facts—that a 1988 FCC survey disclosed that 20% of the cable operators responding had dropped one or more local broadcasting stations and that some 1,700 cable systems had denied carriage in approximately 3,600 cases. See S. Rep. No. 92, *supra*, at 42-43. Rather, they argue (J.S. 26-27) that those figures on dropped stations are in fact relatively modest, that the number of broadcasting stations has increased in the past several years, and that Congress was unjustified in its ultimate finding that cable poses a serious threat to the vitality and availability of local broadcasting.

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the "fairness doctrine" sustained in *Red Lion*. In so doing, the Court reasoned (1) that restrictions on the broadcast media present different concerns from restrictions on individual speakers and (2) that "the presumed effect of the fairness doctrine is one of 'enhancing the volume and quality of coverage' of public issues." *Buckley*, 424 U.S. at 50 n.55 (per curiam). For the reasons discussed above, those considerations indicate that the must-carry provisions of the 1992 Act are consistent with First Amendment principles.

The district court properly declined to substitute its judgment for that of Congress concerning the future effect upon broadcasting of leaving unregulated a vertically integrated and highly concentrated cable industry. This Court has emphasized that "[t]he problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence." *Columbia Broadcasting System, Inc.* v. *Democratic National Comm.*, 412 U.S. 94, 102 (1973). Accordingly, the Court has admonished that it "must afford great weight to the decisions of Congress and the experience of the Commission." *Ibid.* Indeed, in *FCC* v. *League of Women Voters*, *supra*, this Court declined to consider the claim that technological developments had rendered obsolete its approach to broadcast regulation, and indicated that it would not revisit its framework for evaluating First Amendment claims in that area "without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." 468 U.S. at 377 n.11.

There is no less reason to respect the predictive judgment of Congress and the FCC when they address the relationship between two technical, rapidly changing, and closely interdependent industries—broadcasting and cable. Although appellants asked the district court to substitute its judgment for that of Congress, "[t]he special attribute [of Congress] as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the res-

olution of an issue." *Metro Broadcasting*, 497 U.S. at 572 (internal quotation marks omitted). And while Congress cannot "predict with certainty the consequences of unregulated [cable]," its responsibilities to viewers "demand that it 'plan in advance of foreseeable events, instead of waiting to react to them.' " *Southwestern Cable*, 392 U.S. at 177. The district court in this case properly respected Congress's reasonable predictive judgment, which rested on substantial evidence that cable operators have, and will use, substantial market power to the detriment of local broadcasters and of the paramount First Amendment interests of their viewers. See pp. 13-15, *supra*.

In any event, because appellants have mounted a facial attack upon the must-carry provisions of the 1992 Act, they must show that the statute is substantially overbroad—*i.e.*, that it reaches a "substantial amount of speech that is constitutionally protected." *Forsyth County* v. *Nationalist Movement*, 112 S. Ct. 2395, 2401 (1992); see, *e.g.*, *City of Houston* v. *Hill*, 482 U.S. 451, 458-459 (1987). Thus, at a minimum, appellants must show that Congress's predictive judgment about the need for must-carry provisions is demonstrably erroneous in a substantial number of markets in which it applies. Because they have failed to meet that burden, the judgment of the district court should be affirmed.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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